# DIGEST OF IMPORTANT DECISIONS

REPORTED BETWEEN MARCH 5 AND APRIL 10, 1893.

EDITED BY

ALFRED ROLAND HAIG.

## ADMIRALTY.

*Cases selected by* HORACE L. CHEYNEY.

BILLS OF LADING.

1. *Exemption from Liability—General Average.*

A bill of lading which exempts the ship and owner from loss arising from any danger or accident incident "to navigation or transportation, receipt, delivery, storage or wharfage, any fire, collision, explosion of any kind, wetting, combustion or heating," does not include an exemption from liability in general average. Exemption from the ordinary liabilities of a carrier should be expressed in clear and definite language.

A bill of lading which exempts the ship and owner from loss by "fire or wetting" does not include an exemption from liability to contribute in general average for loss of cargo by water poured thereon to extinguish a fire.

*Quære.* Whether it is competent for a common carrier to exempt itself from liability as against general average contribution: "The Roanoke," District Court of the United States, Eastern District of Wisconsin, December 12, 1892, JENKINS, J., 53 Fed. Rep., 370.

2. *Recitals as to Cargo Received not Conclusive—Mistake in Tally.*

A ship does not guarantee that the amount of cargo recited in her bills of lading as received on board, and based on her tally, has been actually so shipped and received; nor can the vendor and vendee of such goods, by any private arrangement, make the ship an insurer of the correctness of her tally, as against fraud or mistake, for their benefit, and as a fulfillment of the vendor's contract, when not fulfilled in fact; and where there is proof of fraud or mistake the ship and owners cannot be held accountable to the consignee beyond the quantity actually received on board: "The Asphodel," District Court of the United States, Southern District of New York, January 23, 1893, BROWN, J., 53 Fed. Rep., 835.

COLLISION.

3. *Damages—Total Loss—Subsequent Freight—Bounties.*

In case of destruction of a vessel by collision the recovery is limited to her value, with interest from the time of the loss, and freight which would have been earned on the particular voyage, and there can be no

recovery of net freight which would have been earned on a subsequent voyage from the port of immediate destination, and for which the vessel was already engaged.

In case of destruction by collision, the fact that the vessel would have been able to earn a bounty under the law of her nationality is an element of value proper to be considered, but no allowance can be made for bounty: Fabre *v.* Cunard Steamship Co., Ltd., Circuit Court of Appeals of the United States, Second District, October 4, 1893, WALLACE, J., 53 Fed. Rep., 288.

LIEN.

4. *Jurisdiction of State Courts to Enforce Lien given by State Laws.*

The courts of a State have jurisdiction to enforce by a proceeding *in rem* liens given by its laws for labor and materials furnished in constructing or repairing domestic vessels, notwithstanding Rev. St. U. S., § 563, subd. 8, and § 711, subd. 3, giving the United States District Courts exclusive jurisdiction of "all civil causes of admiralty and maritime jurisdiction, saving to suitors the right of a common-law remedy in all cases where the common law is competent to give it:" Atlantic Works *v.* "The Glide," Supreme Judicial Court of Massachusetts, January 4, 1893, HOLMES, J., MORTON and KNOWLTON, J.J., dissenting, 33 N. E. Rep., 163.

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## CARRIERS AND TRANSPORTATION COMPANIES.

*Cases selected by* OWEN WISTER.[1]

COMBINATIONS TO MAINTAIN RATES.

1. *Restraint of Trade—Act of July 2, 1890, Sec. 1.*

An agreement between several competing railway companies, and the formation of an association thereunder for the purpose of maintaining just and reasonable rates, preventing unjust discriminations by furnishing adequate and equal facilities for the interchange of traffic between the several lines without preventing or illegally limiting competition, is not an agreement, combination or conspiracy in restraint of trade in violation of the Act of July 2, 1890, § 1. Where each company, by such agreement, maintains its own organization as before, elects its own officers, delegates no powers to the association to govern in any respect the operations or methods of transacting the routine business of the several competing lines, but simply requires that each company shall charge just and reasonable rates, and provides for certain regulations in regard to changes in such rates, such contract or agreement is not forbidden by public policy as amounting to a transfer of the franchises and corporate powers of such companies. It was not the intention of Congress to include common carriers subject to the Act of February 4, 1887, within

[1] During the temporary absence of Mr. Wister, cases in this department will be selected by one of the editors of the journal.

the provisions of the Act of July 2, 1890, which is a special statute, relating to combinations in the form of trusts and conspiracies in restraint of trade: United Sates *v.* Trans-Missouri Freight Association, Circuit Court, District of Kansas, RINER, J., November 28, 1892, 53 Fed Rep., 440..

FREIGHT, REFUSAL TO DELIVER.

2. *Statutory Penalty—Interstate Commerce.*

In an action against a carrier to recover the statutory penalty for refusing to deliver flour shipped from St. Louis, Mo., to Brenham, Tex., directed to plaintiff by the bill of lading, it appeared that the company of which the purchase was made, acting for plaintiff, delivered the car to the St. L., A. & T. road, a common carrier into Texas, making connections with the G., C. & S. F. road and defendant road, both leading to Brenham. The bill of lading stated that the freight was to be carried via the G., C. & S. F., on which the established rate on flour was 40 cents per 100 pounds, but it was turned over to defendant, on which the established rate was 53 cents, and by defendant carried to Brenham. On the arrival of the car plaintiff offered defendant the amount named in the bill of lading—40 cents per 100—which was declined, and the amount of its established rate demanded, which plaintiff refused to pay. *Held*, that the flour was interstate commerce, and as defendant would have been answerable under the acts of Congress requiring an established rate for freight, and making it a misdemeanor to accept more or loss than 53 cents, the statute of Texas imposing a penalty for a refusal to deliver freight on tender of the charges specified in the bill of lading would not apply: Dilligham *v.* Fishl, Court of Civil Appeals of Texas, PLEASANTS, J., December 15, 1892, 21 S. W. Rep., 554.

3. *Interstate Commerce.* See also CONSTITUTIONAL LAW.

INTERSTATE COMMERCE ACT. See also CONSTITUTIONAL LAW.

4. *Short Haul Clause—Joint and Local Rates.*

The long and short haul clause of the Interstate Commerce Act (§ 4) does not apply to a case where the short haul rate is the combined local rates of two connecting lines, and the lower long haul rate is a joint rate made by the two lines acting together; and an indictment alleging such rates is bad: United States *v.* Mellen, District Court, District of Kansas, RINER, J., November 28, 1892, 53 Fed. Rep., 229. Following Railway Co. *v.* Osborne, 52 Fed. Rep., 912.

MEASURE OF DAMAGES.

5. *Delay in Forwarding Baggage.*

The measure of a passenger's damages for a carrier's delay in forwarding her trunk is the value of the use of the property during the delay: Gulf, C. & S. F. Ry. Co. *v.* Vancil; Court of Appeals of Texas, COLLARD, J., February 8, 1893, 21 S. W. Rep., 303.

# CONSTITUTIONAL LAW.

*Cases selected by* WILLIAM STRUTHERS ELLIS.

## FEDERAL.

CONTRACTS.

1. *Impairing Obligation of Contract in Corporate Charter.*

Before the adoption of a requirement of a State Constitution that "the general assembly shall provide by general laws for the organization of all corporations thereafter created, which laws may at any time be altered or repealed," certain street railway companies had been incorporated and authorized to construct and operate street railways on all or any of the streets of a certain city, without any reservation of power to alter or repeal their charters. After the Constitution took effect these companies became consolidated into one corporation, pursuant to the provisions of the code of the State for the consolidation of railroad and street railroad companies: *Held*, that as no intention to subject the previously existing charters to alteration or repeal appeared in the new Constitution or the subsequent legislation, the consolidation did not subject rights granted by the original charters to the dominion of the State. Neither the State, nor the city under authority delegated by the State, could prohibit the consolidated company from occupying a street in the city, in the exercise of the right granted by the original charters, and as such prohibition would impair the obligation of those charters, a suit by the consolidated company to restrain the city from interfering with such use of the street by the company involved a federal question: Citizens' Street Railway Co. *v.* City of Memphis, Circuit Court, Western District of Tennessee, January 4, 1893, HAMMOND, J., 53 Fed. Rep., 715.

INTERSTATE COMMERCE. See also CARRIERS AND TRANSPORTATION COMPANIES.

2. *Foreign Corporation.*

A corporation doing business in one State sold goods to be transferred and delivered to a person doing business in another State, and in an action for the price it was contended by the purchaser that the failure of the corporation to file a copy of its articles with the secretary of the State of which the purchaser was a resident, in compliance with a statute of said State, was a bar to recovery: *Held*, that the transaction was an act of interstate commerce, and even if the statute could be held applicable it would violate the commerce clause of the Federal Constitution, and consequently cannot defeat the action for the price: Lyons-Thomas Hardware Co. *v.* Reading Hardware Co., Court of Civil Appeals of Texas, TARLTON, C. J., February 7, 1893, 21 S. W. Rep., 300.

3. *Jurisdiction of Federal Courts.*

The constitutional grant of jurisdiction to the federal courts in "cases in law and equity," does not authorize those courts to use their powers merely in aid of an investigation before an administrative body. Consequently so much of the twelfth section of the Interstate Commerce Act

assumes to authorize the circuit courts to make orders enforcing subpœnas issued by the interstate commerce commission is unconstitutional: *In re* Interstate Commerce Commission, Circuit Court, Northern District of Illinois, December 7, 1892, GRESHAM, Circ. J., 53 Fed. Rep., 476.

4. *State Police Laws—Original Package.*

In the absence of proof that alum in baking powder is deleterious to health, Gen. Laws Minn., 1889, c. 7, § 1, as amended by Gen. Laws Minn., 1891, c. 119, declaring it a misdemeanor to sell baking powder containing alum, unless the package have a label stating that it contains alum, violates Const. U. S., Art. 1, § 8, granting to Congress the power to regulate interstate commerce, in so far as it relates to original packages imported from another State: *In re* Ware, Circuit Court, Dist. Minnesota, Third Division, SANBORN, J., June 29, 1892, 53 Fed. Rep., 783.

RAILROADS.

5. *Regulation of Railroad Traffic—Interstate Commerce.*

A State statute, which declares that "all regular passenger trains shall stop a sufficient length of time at the railroad station of county seats to receive and set off passengers with safety" applies to a train designated as a "fast mail train," used mainly for carrying the mail, but which also has coaches for the use of passengers, and which passes through part of the corporate limits of a county seat, though it does not pass the regular passenger station at that place. Said statute, applied to a train employed in interstate commerce, is not a regulation of such commerce, for the reason that the statute imposes no restrictions upon the introduction or transportation of any article of commerce, and is but a proper exercise of the police power of the State, inasmuch as it carries out the requirements for the comfort, safety and welfare of the people. The fact that Congress has aided several States by the donation of public lands for the construction of railroads, which eventually form one continuous line, and carry the mail from one State to another, does not relieve the companies operating such roads from the control of the States under whose laws they are respectively organized, even in regard to the trains carrying mail from State to State: Illinois Central R. R. Co. *v.* People, Supreme Court of Illinois, MAGRUDER, J., November 2, 1892, 33 N. E. Rep., 173.

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## CORPORATIONS.

*Cases selected by* LEWIS LAWRENCE SMITH.

CHARTER.

1. *Where its Validity may be Attacked.*

The validity of a corporation cannot be considered by an auditor appointed to distribute the proceeds of a sheriff's sale of the corporation effects: Prouty *v.* Prouty & Barr B. & S. Co., Supreme Court of Pennsylvania, PER CURIAM, January 30, 1893, 25 Atl. Rep., 1001.

2. *Number of Stockholders Necessary.—Acquisition of Entire Stock by one Individual—Liability for Corporate Debts.*

Under the general Statutes of Kentucky, "any number of persons may associate themselves together" for incorporation. All of the stock was purchased, after a regular incorporation, by one man, who transacted the business of the corporation in good faith, and in the course of such business the corporation became accommodation indorser of certain drafts. The holder of these drafts obtained judgment, and sought to obtain a dividend from the assigned estate of the sole stockholder. The Court, stating that the statute required more than one person to make a valid corporation, nevertheless decided that the corporation was not dissolved by the acquisition of all of the stock by one man, but that the operation of its charter was suspended until other persons became stockholders; and, furthermore, that the sole stockholder, in the absence of fraud, was not personally liable for the debts of the corporation: Louisville Banking Co. *v.* Eisenman, Court of Appeals of Kentucky, PRYOR, J., February 25, 1893, 21 S. W. Rep., 531.

3. *Forfeiture of Charter—Parties to Proceedings.*

In an action by the State to forfeit a corporation's charter for want of substantial compliance with the statutory requirement in its formation, viz., that the articles of incorporation had been acknowledged by four instead of five persons, as required by the Statute, the corporation is a necessary party defendant, and making it such is not an admission of its corporate character, so as to preclude the State from questioning its right to corporate existence: People *v.* Stanford, 18 Pac. Rep., 85; 19 Pac. Rep., 693, and 77 Cal., 360, distinguished: People *v.* Montecilo Water Co., Supreme Court of California, TEMPLE, C., February 9, 1893, 32 Pac. Rep., 236.

In an action under the Code of Alabama, for acting as a corporation, without being incorporated, against the officers of the alleged corporation, a different conclusion was reached from that arrived at in the preceding case; and it was held that the corporation was not a proper party. The case of People *v.* Stanford, 77 Cal., 360, was regarded as destroying the effect of People *v.* Flint, relied on in People *v.* Montecilo Water Co.: State, *ex rel.*, Sauche *v.* Webb, Supreme Court of Alabama, HARALSON, J., January 31, 1893, 12 So. Rep., 377.

4. *Forfeiture of Franchises Induced by Action of State Authorities.* See *infra*, 6, 7.

DIVIDENDS.

5. *All the Stockholders have the Right to Participate.*

Where a corporation declares a dividend on all its stock except the shares named in a certain certificate, the owner of such certificate may sue the corporation for the dividend on his shares. Such an exception is void. Moreover, the purchaser of such stock who has possession of the certificate, and who has applied to the corporation to have the stock transferred to him on its books, may sue the corporation for a dividend due on his stock, without first compelling a transfer of the stock to him

by a proceeding in equity: Hill *v.* Atoka Coal & M. Co., Supreme Court of Missouri, BURGESS, J., February 14, 1893, 21 S. W. Rep., 508.

FRANCHISES.

6. *Appropriated by Another Corporation.*

One public corporation cannot take the franchise of another, which is in use, unless expressly authorized by the legislature, and then only by regular condemnation, and cannot take it at all if such taking will materially affect its use: Fidelity T. & S. V. Co. *v.* Mobile S. Ry. Co., Circuit Court, Southern District, Alabama, TOULMIN, D. J., October 22, 1892, 53 Fed. Rep., 687.

7. *Similarity of Names of Two Associations—Forfeiture of Charter.*

Members of a voluntary association cannot enjoin a corporation from acting under its charter, because it uses the name of the voluntary association; for the charter, having been granted by the legislature, can only be forfeited and revoked by the legislature, or at the suit of the State. Nor can the members of the association maintain a bill to enjoin the use of the name of the corporation, since the act of incorporation fixed the name such corporation was to bear, and since the right to use that name was part of its franchise, conferred on it by law: Pauline *v.* Portuguese Ben. Association, Supreme Court of Rhode Island, MATTESON, C. J., January 28, 1893, 26 Atl. Rep., 36.

PUBLIC CORPORATIONS.

8. *Normal Schools.*

Normal schools are not public or *quasi* public corporations under the laws of Pennsylvania, and their property is subject to mechanics' liens: McLeod *v.* Central Normal School, Supreme Court of Pennsylvania, CLARK, J., February 6, 1893, 25 Atl. Rep. 1109; 32 W. N. C., 37.

STOCK.

9. *Transfer of Shares by Corporation acting upon Power of Attorney which has been forged—Liability for.* See EVIDENCE.

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## CRIMINAL LAW.[1]

BURGLARY.

1. *What Constitutes.*

Where a person enters the chimney of a storehouse at the top, intending to go down such chimney into the store to steal, he is guilty of burglary, though he does not in fact get through the chimney into the building where the goods are: Olds *v.* State, Supreme Court of Alabama, HARALSON, J., February 6, 1893, 12 So. Rep., 409.

[1] The cases in Criminal Law and Criminal Practice this month were selected by one of the Editors.

MURDER.

2. *Duress of Third Persons.*

On a trial for murder, after defendant testified that two men threatened to take his life unless he killed deceased, the Court refused to instruct the jury that if defendant killed deceased "under threats of immediate impending peril to his own life, such as to take away the free agency of defendant, then he is not guilty." *Held*, that the refusal so to charge was proper, because, aside from the common-law rule that taking the life of an innocent person cannot be justified on a plea of compulsion, the charge ignored the evidence in the case that defendant, after being informed by the men that he must kill deceased, went with them some distance to deceased's house without seeking to escape: Arp *v.* State, Supreme Court of Alabama, COLEMAN, J., January 26, 1893, 12 So. Rep., 301.

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## CRIMINAL PRACTICE.

JURISDICTION.

1. *Accomplice, Jurisdiction to Try—Acts Committed in Another County.*

The District Court of a county in which a murder was committed has jurisdiction to try an accomplice, though all the acts constituting defendant such accomplice were committed in another county: Carlisle *v.* State, Court of Criminal Appeal, Texas, HURT, P. J., February 11, 1893, 21 S. W. Rep., 358.

QUESTIONS OF LAW.

2. *Power of Jury to Determine in Criminal Cases.*

The doctrine that jurors are paramount judges of the law as well as of the facts in criminal cases, is contrary to the common law, contrary to Constitution, Chapter I, Articles I, IV, guaranteeing every person "a certain remedy" for all wrongs, conformable to the laws, and that he shall not be deprived of liberty, "except by the laws;" contrary to R. L., §§ 1699, 1700, relative to the reservation of questions of law to the Supreme Court after a verdict of guilty; and contrary, also, to Fed. Const., Art. VI, declaring such Constitution, and all laws in pursuance thereof, the supreme law, binding on all judges in every State: State *v.* Croteau, 23 Vt., 14, overruled: State *v.* Burpee, Supreme Court of Vermont, THOMPSON, J., February 19, 1892, 25 Atl. Rep., 964.

WITNESSES, COMPETENCY OF.

3. *Pardon—Statutory Pardon under State Law—Evidence of a Pardoned Criminal in Trial in U. S. Courts.*

The competency of witnesses in criminal trials in the National Courts, in the absence of special provision by Congress, is to be determined by the law of the State where the trial takes place as it existed

when the judiciary act of 1789 was passed. A person who has been convicted and sentenced in the Courts of Pennsylvania for murder is incompetent to testify in the National Courts unless such disability has been removed by a pardon. The Pennsylvania statute providing that the enduring of the punishment shall have the like effect and consequences as a pardon by the governor amounts to a legislative pardon, and enables such person to testify in criminal trials in the National Courts: United States *v.* Hall, District Court, W. D. Pennsylvania, BUFFINGTON, J., December 17, 1892, 53 Fed. Rep., 352; 32 W. N. C., 110.

WRIT OF ERROR CORAM NOBIS.

4. *Pleading Guilty under Fear of Mob Violence.*

Where the accused in a criminal prosecution in the district court is forced, through well-grounded fears of mob violence, to plead guilty to the criminal charge, and to be sentenced to imprisonment and hard labor in the penitentiary for a term of years, he has a right to relief from such sentence and plea by an action or proceeding in the same court in the nature of a writ of error *coram nobis*. And in such a case, where the accused was sentenced to imprisonment in the penitentiary for a period of forty-two years, and after having served more than seven years of that term he commences an action in the nature of a writ of error *coram nobis* to set aside such sentence and plea, his action is not barred by any statute of limitations, for the reason that no statute of limitations will operate against the remedy of a party while he is under the legal disability of imprisonment: State *v.* Calhoun, Supreme Court of Kansas, VALENTINE, J., January 7, 1893, 32 Pac. Rep., 38.

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## EQUITY.

*Cases selected by* ROBERT P. BRADFORD.

FRAUD.

1. *Attorney and Client—Adverse Title.*

The relation of attorney and client is most confidential, and while it in the slightest degree continues the former cannot acquire a title adversely to the latter in the property to which the relation attaches: Sullivan *v.* Walker, Supreme Court of Mississippi, COOPER, J., December 19, 1892, 12 So. Rep., 250.

2. *Conveyance—Bona Fides of Purchaser.*

W, with a view to defraud his creditors, and with a knowledge of such purpose by the husband of S, transferred his property to S for a reasonably adequate consideration, which transfer S, acting on the husband's advice, accepted. *Held*, that S was not chargeable with her husband's knowledge of W's purpose, unless actually brought home to her: Bruen *v.* Dunn, Supreme Court of Iowa, GIVEN, J., January 31, 1893, 54 N. W. Rep., 468.

3. *Marital Rights.*

A disposition of her property by a woman about to marry without the consent of her intended husband is a fraud upon his rights unless the consideration is a valuable one. The benefit of children by a former marriage is not such a valuable consideration. In North Carolina neither constructive nor actual notice before the marriage will bar the husband's right to set aside such a conveyance made after the engagement: Ferebee *v.* Pritchard, Supreme Court of North Carolina, SHEPHERD, C. J., February 21, 1893, 16 S. E. Rep., 903.

TRUSTEES.

4. *Accounting—Laches of cestui que trust.*

In cases of continuing trusts that are strictly such, and recognized and enforced in courts of equity only, so long as the relation of trustee and *cestui que trust* continues to exist, no length of time will bar the *cestui que trust* of his rights in the subject of the trust as against the trustee, unless circumstances exist to raise a presumption from lapse of time of an extinguishment of the trust, or unless there has been an open denial or repudiation of the trust brought home to the knowledge of the *cestui que trust*, which would require him to act as upon an asserted adverse title. Laches is a neglect to do something that by law a man is obliged or in duty bound to do, and the application of this doctrine depends entirely upon the circumstances of each particular case: Anderson *v.* Northrop, Supreme Court of Florida, TAYLOR, J., December 28, 1892, 12 So. Rep., 318.

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## EVIDENCE.[1]

*Cases selected by* HENRY N. SMALTZ.

FORGERY.

1. *Attempted Copies of Signature Found.*

In an action against a corporation for permitting a transfer of shares of its capital stock to be made on its books under a power of attorney alleged to have been forged by the transferee, to whom new certificates were issued, a number of forged signatures of the name of the owner of the stock found in the transferee's desk in various stages of execution, some written in full and some half written, are admissible as showing the means by which the forgeries in question were effected, and the individual by whom they had been perpetrated: Penna. Co. *v.* Phila., G. & N. R. R. Co.,[2] Supreme Court of Pennsylvania, PER CURIAM, following opinion of THAYER, P. J. of Common Pleas, No. 4, of Philadelphia County, February 6, 1893, 25 Atl. Rep., 343; 31 W. N. C.

WITNESSES. COMPETENCY OF PARDONED FELON. See CRIMINAL PRACTICE, 3.

[1] This department this month was in charge of one of the Editors.

[2] This case will be annotated in June number.

# INSURANCE.

*Cases selected by* HORACE L. CHEYNEY.

FIRE INSURANCE.

1. *Conditions of Policy—Foreclosure Sale.*

An advertisement and sale of insured property under a power contained in a mortgage is not a violation of a policy of insurance which provides that it shall be void on the entry of a decree of foreclosure of the insured property, since, though the foreclosure sale be regarded as equivalent to a decree of sale by a court of equity, such decree does not pass title until ratified by the Court: Hanover Fire Ins. Co. *v.* Brown, Court of Appeals of Maryland, BRYAN, J., January 19, 1893, 25 Atl. Rep., 989.

LIFE INSURANCE.

2. *Mutual Benefit Insurance—Beneficiary—Dependent Person—Affianced Wife.*

Where a mutual benefit society, organized for the benefit of relatives and persons dependent on members, issues a certificate payable to the member's "affianced wife," the question whether she was really dependent on the member, and was, therefore, entitled to be a beneficiary, is a question of fact. Where the affianced wife was, during the entire period of her engagement, working for her own living, earning during part of that time more than her intended husband, and receiving nothing from him except occasional presents of clothing and money, she is not "dependent" on him: Alexander *v.* Parker, Supreme Court of Illinois, MAGRUDER, J., January 18, 1893, 33 N. E. Rep., 182.

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# MUNICIPAL CORPORATIONS AND PUBLIC LAW.

*Cases selected by* MAYNE R. LONGSTRETH.

CLASSIFICATION OF CITIES—POWERS OF CERTAIN CLASS TO LEGISLATE FOR GENERAL WELFARE.

1. *City Ordinance Concerning Animals in Street, Validity of.*

Where the general statutes authorize cities of the second and third class to regulate the running at large of animals in the street, but do not expressly give the same powers to cities of the fourth class, such cities cannot exercise that power under the general welfare clauses in their charters: Wilson *v.* Beyers, Supreme Court of Washington, DUNBAR, J., December 1, 1892, 32 Pac. Rep., 90.

That such power is given by the general welfare clause, see City of Waco *v.* Powell, 32 Tex., 258; Com. *v.* Bean, 14 Gray, 52; that it is not given, see Varden *v.* Mount, 78 Ky., 86; and Collins *v.* Hatch, 18 Ohio, 523.

CUSTOMS DUTIES.

2. *Construction of Laws—Duty on Knit Woolen Clothing.*

In construing the Tariff Act of October 1, 1890, the Court will, in a proper case, as an aid to interpretation, consider the fact that the general idea of the statute is that of protection to American manufactures, and this idea suggests that an article which has been subjected to an additional process of manufacture is subject to a higher rather than an equal or lower rate of duty. Knit woolen underclothing is dutiable as "woolen wearing apparel," and not as "knit fabrics:" Arnold, Constable & Co. *v.* United States, Supreme Court of the United States, BREWER, J., February 6, 1893, 13 S. C. Rep., 406.

ELECTIONS.

3. *Female Suffrage—School Elections.*

Although the Constitution of a State may limit the elective franchise to "male citizens of the United States," nevertheless an Act entitling women to vote at school elections is constitutional, as applied to elections of members of boards of education, if they are officers who are not named in the Constitution, and concerning the manner of whose election the legislature has, therefore, discretionary power: Phimmer *v.* Yost, Supreme Court of Illinois, BAILEY, C. J., January 19, 1893, 33 N. E. Rep., 191. Following Belles *v.* Burr, 76 Mich.; Wheeler *v.* Brady, 15 Kan., 26; State *v.* Cones, 15 Neb., 444; and Opinion of the Judges, 115 Mass., 603.

LOCAL ASSESSMENTS.

4. *Municipal Improvements.*

Constitutional provisions that taxation "shall be equal and uniform," and that "no one species of property shall be taxed higher than any other species of equal value," forbid any legislation authorizing local assessments on the part of a city for public improvements. The doctrine of local assessments proceeds upon the false assumption that the abutting property is exclusively benefited by the improvement. If this be so, then the right of the public to tax the owner at all for that purpose fails, because the public has no right to tax a citizen to make him build improvements for his own benefit only. Taxation must be for a public purpose, and being so, must be equal and uniform throughout the division laying the tax: City of Norfolk *v.* Chamberlain, Supreme Court of Appeals of Virginia, RICHARDSON, J., December 15, 1892, 16 S. E. Rep., 730.

The leading case of People *v.* Mayor, 4 N. Y., 419, criticized at length and disapproved; opinions of Chief Justice MARSHALL in Bank *v.* Billings, 4 Pet., 514, and McCulloch *v.* Maryland, 4 Wheat., 428, upon taxation, distinguished. *Id.*

PUBLIC OFFICERS.

5. *Eligibility—Naturalization of Alien after Election.*

In the absence of any constitutional or statutory provisions as to the qualifications of officers, a person who at the time of his election as sheriff is an alien, and is consequently ineligible to hold office, may

remove the disability and entitle himself to the office by being naturalized as a citizen before his induction to office. And this is so though Section 692 of the Code provides for contesting elections to county offices upon the ground, among others, that the person declared elected "was not eligible to the office at the time of his election," for any person who can qualify himself in time to take and hold the office is eligible to it at the time of the election: State *v.* Van Beek, Supreme Court of Iowa, GIVEN, J. (ROBINSON, C. J., and GRANGER, J., dissenting), February 2, 1893, 54 N. W. Rep., 526.

6. *Salary—Right of de jure Officer after Payment to de facto Officer.*

Where a county has once made payment of the salary of a county office to one actually in possession of the office, performing its duties with color of title, before his right to the office has been determined against him by a competent tribunal, it cannot afterward be compelled to pay the same salary to the *de jure* officer: State *v.* Milne, Supreme Conrt of Nebraska, NORVAL, J., February 15, 1893, 54 N. W. Rep., 521. Following Steubenville *v.* Cull, 38 Ohio St., 18; Wayne Co. *v.* Benoit, 20 Mich., 176; Hagan *v.* City of Brooklyn, 126 N. Y., 643; Saline Co. *v.* Anderson, 20 Kan., 298; State *v.* Clark, 52 Mo., 508; Shannon *v.* Portsmouth, 54 N. H., 185; Michel *v.* New Orleans, 32 La. Ann., 1094.

The *de jure* officer may, however, recover from the *de facto* incumbent the salary and emoluments received while in office after deducting the expenses incurred in earning them: Mayfield *v.* Moore, 53 Ill., 528; Dolan *v.* Mayor, 68 N. Y.. 274; Douglass *v.* State, 31 Ind., 429.

Some jurisdictions, however, hold that the *de jure* officer can recover from the county in spite of payment to the *de facto* officer: Mayor *v.* Woodward, 12 Heisk. (Tenn.), 499; People *v.* Smith, 28 Cal., 21; Carroll *v.* Siebenthaler, 37 Cal., 193.

See also dissenting opinion of COOLEY, J., in Wayne Co. *v.* Benoit, 20 Mich., 176.

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## PLEADING AND PRACTICE.

*Cases seleeted by* ARDEMUS STEWART.

### PLEADING.

ABATEMENT.

1. *Action Prematurely Brought—Reformation of Instrument.*

A plea in abatement is the proper mode of raising the question that an action on a note is prematurely brought, when such fact does not appear on the face of the note; but, when there are coupled with the plea matters which show that it can only be sustained by proof of facts necessitating a reformation of the instrument, the pleading will be insufficient unless it contains a prayer for reformation: Scott *v.* Norris, Appellate Court of Indiana, REINHARD, C. J., February 4, 1893, 33 N. E. Rep., 227.

DEMURRER.

2. *Partial Defects.*

A demurrer which is addressed to only a part of a plea is untenable, and the remedy for such partial defects is by motion to strike out, by objections to evidence, or by instructions to the jury to disregard the defective allegations: Corpening *v.* Worthington, Supreme Court of Alabama, HARALSON, J., February 6, 1893, 12 So. Rep., 426.

MISJOINDER OF CAUSES.

3. *Election after Trial—Demurrer Ore Tenus.*

Where a single count of a complaint contains two causes of action, one in tort and the other in contract, and plaintiff is allowed, over defendant's objection, to introduce evidence to sustain both causes, the error is not cured by plaintiff's election, after the trial, to recover in contract only, when the judgment rendered does not limit plaintiff's recovery of costs to those incurred in the action in contract. Where an action is brought before a justice it is not too late to raise the question of misjoinder of issues on a demurrer ore tenus in the Circuit Court on appeal: Wirth *v.* Bartlett, Supreme Court of Wisconsin, ORTON, J., January 31, 1893, 54 N. W. Rep., 399.

## PRACTICE.

CONTINUANCE.

1. *Abuse of Discretion.*

On an application by plaintiff for a continuance, his affidavits showed that he had used due diligence to prepare for trial, setting out in detail the nature and kind of diligence, and that the most material and necessary witness, a non-resident, was so sick that he could not give his deposition, and that no other witness was known to plaintiff by whom he could prove what he expected to prove by this witness. The affidavit also set out what plaintiff expected to prove by such witness, clearly establishing the materiality of the testimony. *Held*, that a refusal to grant a continuance was such an injudicious use of discretion as to warrant a reversal: Davis & Rankin Bldg. & Mfg Co. *v.* Riverside Butter & Cheese Co., Supreme Court of Wisconsin, PINNEY, J., January 31, 1893, 54 N. W. Rep., 506.

REMOVAL OF CAUSES.

2. *Time of Removal—Filing Pleadings in State Court.*

It is not necessary, in order to the removal of a cause, that any pleading on behalf of defendant should first be filed in the State court; and decisions by a State court that such filing is necessary are not binding upon the Federal courts: Egan *v.* Chicago, M. & St. P. Ry. Co., Circuit Court of the Northern District of Iowa, E. D., SHIRAS, Dist. J., January 21, 1893, 53 Fed. Rep., 675.

SERVICE OF PROCESS.

3. *Leaving Copy at House.*

Where a person disappears from home, without any expression of an intention not to return, process left with his wife, nine days after his

disappearance, at his usual place of abode, is a sufficient service to give the court jurisdiction: Botna Valley State Bank *v.* Silver City Bank *et al.*, Supreme Court of Iowa, ROTHROCK, J., January 31, 1893, 54 N. W. Rep., 472.

TROVER BY MEMBER OF FIRM.

4. *Nonjoinder of Partner.*

One partner cannot maintain trover for the recovery of property conveyed by his co-partner in fraud of the partnership: Cornells *v.* Stanhope, 14 R. I., 99, followed; White *v.* Campbell, Supreme Court of Rhode Island, MATTESON, C. J., January 21, 1893, 26 Atl. Rep., 40.

VERDICT.

5. *Gambling Verdict—Impeachment by Juror.*

Where a jury agree that each member thereof shall mark the sum which he thinks the plaintiff is entitled to recover on a slip of paper, and then ascertain by addition the amount of the sums so marked, and to then divide said amount by twelve (the number of jurors), and that the quotient resulting from such division shall be the amount of the verdict, such verdict is obtained by "resort to a determination of chance," within the meaning of that term as used in subdivision 2, § 4439, Rev. St. 1887. The affidavit of a juror is competent proof to show that the verdict was so obtained: Flood *v.* McClure, Supreme Court of Idaho, SULLIVAN, J., February 3, 1893, 32 Pac. Rep., 254.

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## PROPERTY.

*Cases selected by* WILLIAM A. DAVIS.

EMINENT DOMAIN.

1. *Elevated Railways—Injuries to Easements—Benefits.*

In an action for damages to property by reason of the construction and maintenance of an elevated railway, it is error to refuse to find that the easements appurtenant to the land, and interfered with by the railway, aside from any consequential damages to the premises from the taking thereof, have in themselves only a nominal value.

It is error to refuse to find that the only property rights of an abutting owner in the streets taken or interfered with by the railway are easements of light and of air and of access in and over the street.

The courts may judicially notice that an elevated railway increases the traffic and business in the wide avenues occupied by it, even if the evidence introduced does not show this: Bookman *v.* N. Y. El. R. Co., Court of Appeals of New York, EARL, J., February 28, 1893, 33 N. E. Rep., 333.

LAND.

2. *Charge on Estate.*

Testator devised that portion of his premises on which a tannery was situate, to his son John, and the portion having a mill on to his son Joseph. The will provided: "John shall receive a deed free from all incumbrances. It is reserved that he is" to take water out of the mill

race for running his tannery, for which he "shall tan yearly, for my son Joseph, one calf skin and one beef hide," free of charge: *Held*, that the privileges reserved were personal to the legatees, and created no charge on the tannery tract: Mosser *v.* Lesher, Supreme Court of Pennsylvania, PER CURIAM, February 13, 1893, 25 Atl. Rep., 1085.

## TORTS.

*Cases selected by* ALEXANDER DURBIN LAUER.

DEFAMATION.

1. *Slander of Breeding Stallion.*

False and malicious statements concerning the plaintiffs' breeding stallion are actionable, without alleging special damages, when it is apparent from the plain terms of the declaration that the action is based, not only upon the slander of the horse, but also upon the character and credit of the plaintiffs, who are engaged in keeping the horse for hire and gain: Henkle *v.* Schaub, Supreme Court of Michigan, LONG, J., February 3, 1893, 54 N. W. Rep., 293.

NEGLIGENCE.

2. *Imputation of Negligence.*

The deceased, who was blind, was driving with his father on a joint enterprise when the accident happened by the concurrent negligence of the defendant company and the father. *Held*, that the negligence of the father should be imputed to the plaintiff: Johnson *v.* Gulf, C. & S. F. Ry. Co., Court of Civil Appeals, Texas, HEAD, J., January 17, 1893, 21 S. W. Rep., 274. See annotation on the subject of imputation of negligence in the April number of this magazine.

## WILLS, EXECUTORS AND ADMINISTRATORS.

*Cases selected by* MAURICE C. BELKNAP.

DOWER.

1. *Partnership Property.*

A widow has no dower interest in a storehouse and lot belonging to the partnership of which her husband was a member. Such property is a part of the social assets of the firm, and is regarded as personalty, in which the widow could participate only as a distributee: Supreme Court of Appeals of Virginia, FAUNTLEROY, J., December 15, 1892, 16 S. E. Rep., 671.

WILL.

2. *Devise of Same Land to Two Persons.*

Where a testator, in one clause of his will, devises a tract of land in fee, and in a subsequent clause devises the same land in fee to another person, the two devisees will take the land as tenants in common, each taking an undivided half: Day *v.* Wallace, Supreme Court of Illinois, WILKIN, J., January 18, 1893, 33 N. E. Rep., 185.